IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5692 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

---

BHARTIBEN BABULAL JOSHI

Versus

ADMINISTRATIVE OFFICER

---

Appearance:

1. Special Civil Application No. 5692 of 2002

MR AR THACKER for Petitioner No. 1

MR BN KAKADIYA for Respondent No. 1

Mr. Siraj Ghori, AGP for Respondent No. 2

---

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 23/12/2003

ORAL JUDGEMENT

Heard learned advocate Mr. AR Thakkar for the

petitioner; Mr. Siraj Ghori,learned AGP for the respondent No.2. Learned advocate Mr. B.N. Kakadia who is appearing for the respondent No.1 has not remained present today. This Court has admitted this petition by issuing rule thereon by order dated 23.12.2002 and the matter was expedited. Earalier, this matter was notified for final hearing on 16.12.2003 but in view of the absence of the learned advocate Mr. Kakadia, the matter was adjourned to 18.12.2003 while clarifying that the matter will be considered by this court on merits on the next adjourned day i.e. 18.12.2003 if learned advocate Mr. Kakadia will not remain present on 18.12.2003. Inspite of such order, on 18.12.2003, learned advocate Mr. Kakadia had remained absent and in the interest of justice, the matter was adjourned to 23.12.2003. Today also, when the matter was called out in the first round, learned advocate Mr. Kakadia has not remained present. Even in the second round also, same was the situation. In view of that, the matter was taken up for hearing in absence of the learned advocate Mr. Kakadia.

The short question arising for consideration of this Court is as to whether the petitioner who is working as Vidya Sahayak (Assistant Teacher) with the respondents is entitled for the maternity leave with salary or not. The facts of the present petition are to the effect that the petitioner was appointed as Vidya Sahayak (Assistant Teacher) under the control of of the respondents by order dated 5.11.1998. The petitioner resumed duties as such in school no. 3 in Nagrik Prathmik Shala Palitana. Thereafter, the petitioner had proceeded on maternity leave from 7th September, 1999 to 28th October, 1999 and thereafter from 24.11.1999 to 24.12.1999, in all, 83 days the petitioner remained on maternity leave. The maternity leave was sanctioned by the respondents in favour of the petitioner but it was a leave without pay. The petitioner therefore approached the respondents by way of representation and her representation in that regard was also rejected by the respondents.The petitioner, thereafter, served the respondents with a legal notice dated 1.4.2002 through her advocate in that regard which was replied by the respondents through their advocate Shri Kakadia on 29.4.2002 wherein contention was raised by the respondents that according to the Government Resolution, the petitioner is not entitled for the maternity leave and at the relevant time, the petitioner was working on probation and was not regularly appointed and, therefore, the petitioner is not entitled for the benefit of maternity leave with pay. It has also been contended by the respondents in their reply to the

legal notice that the maternity leave was enjoyed by the petitioner with break and, therefore, the petitioner is not entitled for such benefit. I have taken into consideration these contentions raised by the respondent in its reply to the legal notice.

No affidavit in reply has been filed by either of the respondents before this Court.

Learned advocate Mr. Thakkar appearing for the petitioner has submitted that the matter at issue was considered by the apex court the matter of MUNICIPAL CORPORATION OF DELHI VERSUS FEMALE WORKERS (MUSTER ROLL) & ANR. reported in 2000 (3) GLH 163 and in the said matter, benefit of maternity leave was granted by the apex court to the daily wager woman. Relying upon the said judgment of the apex court, learned advocate Thakkar submits that the petitioner is also entitled for the same benefits as were granted by the apex court in the aforesaid matter.

On the other hand, learned AGP Mr. Ghori appearing for the respondent no.2 has submitted that according to the Government Resolution, Vidya Sahayaks who is not regularly appointed is not entitled for such benefit and, therefore, the respondents were right in not granting such benefit to the petitioner. Therefore, according to him, there is nos substance in this petition and the same is, therefore, required to be dismissed with costs.

I have considered the averments made by the petitioner in the memo of petition as well as the submissions made by the learned advocates for the parties. I have also considered the judgment of the apex court in the matter of MUNICIPAL CORPORATION OF DELHI VERSUS FEMALE WORKERS (MUSTER ROLL) & ANR. reported in 2000 (3) GLH 163. I have also taken into consideration relevant provisions of the Maternity Benefit Act, 1961.

It is not in dispute that at the relevant time when the petitioner enjoyed the leave, the petitioner was working with the respondents. However, she was not made regular at the relevant time when the leave was enjoyed by her but the question is that while working during the probation, initially appointment on the post of Vidya Sahayak, whether the petitioner is entitled for the benefit of maternity leave with salary or not. Same situation was examined by the apex court in the matter of MUNICIPAL CORPORATION OF DELHI VERSUS FEMALE WORKERS (MUSTER ROLL) & ANR. reported in 2000 (3) GLH 163

wherein the female workers working on daily wage basis raised demand for grant of maternity leave which was denied by the corporation taking a stand that it is available only to the regular female workers and not to those whose service was not regularized. In the facts of the said case, it was held by the apex court that the provisions of the Maternity Benefit Act, 1961 apply even to casual female workers and they are entitled to maternity benefits. In para 32 of the said decision, it has been observed by the apex court as under:

"32. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Workmen who constitute amongst half of the segment of our society have to be honoured and treated with dignity at places where they work to ear their livelihood. Whatever be the nature of their duties, their avocation and the place where they work, they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realize the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being vitalized for forced absence during the pre or post nanal period."

After observing as aforesaid, the apex court has considered the Universal Declaration of Human Rights adopted by the United Nations on 10th of December, 1948, set in motion the universal thinking that human rights are supreme ad ought to be preserved at all case. In para 36 of the said judgment, the apex court has also considered Article 11 of the Convention on the Elimination of all forms of discrimination against women. Thereafter, the apex court further observed as under in para 37 of the judgment:

"37. These principles which are contained in Article 11 reproduced above, have to be read into the contract of service between Municipal

> COrporation of Delhi and the Women Employees (Muster Roll); and so read these employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961. We conclude our discussion by providing that the direction issued by the Industrial Tribunal shall be complied with by the Municipal Corporation of Delhi by approaching the State Government as also the Central Government for issuing necessary notification under the Proviso to Sub Section (1) of sec.2 of the Maternity Benefit Act, 1961, if it has not already been issued. In the meantime, the benefits under the Act shall be provided to the women (muster roll) employees of the Corporation who have been working with them on daily wages. "

Therefore, considering the provisions of the Maternity Benefit Act, 1961 and also considering the observations made by the apex court in the aforesaid decision and also considering the facts of the present petition, according to my opinion, the ratio of the decision of the apex court would also apply to the facts of the present case because here also, benefit of maternity leave has been, in substance,denied to the petitioner only on the ground that she is not regularly appointed on the post of Vidya Sahayak and, therefore, she is not entitled for such benefit on the basis of the Government Resolution, though maternity leave has been sanctioned by the respondents but without wages. Considering these facts of the present case, according to my opinion, decision of the apex court would squarely apply to the facts of the present case and would cover the matter at issue. I am, therefore, of the opinion that the petitioner is entitled for the maternity leave for the period from 7th September, 1999 to 28thOctober, 1999 and 24th November, 1999 to 24th December, 1999, in all, for 83 days with wages for the said period.

In the result, this petition is allowed. Respondents are directed to pay the wages for the maternity leave from 7th September, 1999 to 28thOctober, 1999 and 24th November, 1999 to 24th December, 1999, in all, for 83 days with wages for the said period, within one month from the date of receipt of copy of this order. Rule is made absolute accordingly with no order as to costs.

Dt.23.12.2003. (H.K. Rathod,J.)

Vyas